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SUPREME COURT, U.S.

No. 74-1051

FEB 21 1975
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

KARL ANTON POMEROY VON LEWINSKI,

Petitioner,

v.

BYRON V. PEPITONE, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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THE CASILLAS PRESS, INC.–1717 K Street, N. W.–Washington, D. C.–223-1220

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No.

KARL ANTON POMEROY VON LEWINSKI,
Petitioner,

v.

BYRON V. PEPITONE, as Acting Director,
National Headquarters Selective Service System

and

LINWOOD G. WILHELM, as State Director,
Selective Service System

and

KEITH DENGLER, as Chairman,

and

BETTY JOE LUNDY,

and

FRANK COCKERILLE,

and

DWIGHT L. HUBBARD,

and

DONALD H. SHANER, as Members of Local Board No. 39,
Selective Service, Fairfax County

and

RICHARD G. KLEINDIENST,
As Attorney General of the United States

and

WILLIAM P. ROGERS,
As Secretary of State,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

TO: The Honorable, The Chief Justice of the United States and Associate Justices of the Supreme Court of the United States:

The petitioner respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered on November 25, 1974, affirming the granting of a Motion for Summary Judgment against the petitioner entered November 1, 1973. Petitioner was not accorded an oral argument in either the United States District Court for the District of Columbia nor the United States Court of Appeals for the District of Columbia Circuit. The Order of the District Court, and the Judgment, Order and Memorandum of the United States Court of Appeals is printed here and attached to this Petition.

OPINION BELOW

No formal opinion was rendered by the United States District Court. The Memorandum Opinion of the United States Court of Appeals is printed in the Appendix to Petition. It was rendered November 25, 1974.

JURISDICTION

The Jurisdiction of this Court is based on District of Columbia Code, Section 11-521, Title 28 United States Code, Sec. 1391, Title 28 United States Code, Sec. 2201,

Title 28 United States Code, Sec. 1331, in that this action arises under the Constitution of the United St ates, as amended, and specifically under the First, Fifth, Sixth and Fourteenth Amendments and under Sections 1 of Articles 1, 2 and 3 of the Constitution. Also Under Title 8 United States Code, Sec. 1401, and the Universal Military Training and Service Act of 1967, 50 United States Code, Sec. 451.

QUESTIONS PRESENTED

Whether a Fourteenth Amendment citizen (native born), nevertheless possessed of dual citizenship, United States and West German, living in Canada, may divest himself of United States citizenship by writing a letter to his Selective Service Board affirming that he is a citizen of the Federal Republic of West Germany, obtaining a West German passport after affirming his allegiance to West Germany, and appearing before the United States Consul and affirming *under oath* that he is a citizen of West Germany?

Whether the above acts do not constitute affirmative voluntary acts clearly manifesting a decision to accept foreign nationality, acts inconsistent with United States citizenship, or evidence of an efficient renunciation of United States citizenship?

Whether the District Court and the Court of Appeals denied petitioner substantial rights in ruling against petitioner solely on the pleadings and attachments thereto, without allowing him to present testimony or to orally argue his position?

STATEMENT OF THE CASE

Petitioner on January 29, 1972, filed a complaint for Declaratory Judgment, Mandamus, Injunction and/or Restraining Relief in the United States District Court for the District of Columbia. The defendants therein are officers and agents of the United States Selective Service System, and the Secretary of State and Attorney General of the United States, and they are sued in their official capacity. In his complaint, the petitioners alleged he had no duty to report for induction into the Armed Forces of the United States as ordered by respondents. By way of answer, the respondents stated they had determined the petitioner to be a citizen of the United States and subject to induction into the Armed Forces. Respondents also filed a Motion for Summary Judgment stating there was no genuine issue of material fact, and this motion was supported by documents from the Selective Service System files and the United States Department of State, which in substance stated that administratively the respondents found the petitioner to be a citizen of the United States.

The petition filed an Opposition to the Motion for Summary Judgment stating the petitioner had taken an oath of allegiance to the Bundes-Republik Deutchland, *inter alia,* and that he had informed the consul in Toronto of his intention to be a West German citizen, used a West German passport, refused to report for induction in the U.S. Armed Forces on the ground that he was a non-resident alien and had been abroad for a number of years.

The Motion for Summary Judgment was granted without a hearing on November 1, 1973, and Notice of Appeal was filed November 27, 1973. An Order of the United States Court of Appeals for the District of Columbia Circuit was entered November 15, 1974 removing the case from the

"argument calendar" and the judgment of the District Court was affirmed on November 25, 1974.

Petitioner was born in Daytona, Florida, in the United States on February 24, 1945. His father was a German national, then an enemy alien, and his mother a native born citizen of the United Sates. Petitioner at birth was both a citizen of the United States, and a national of Germany. On March 6, 1963, petitioner aged 18, registered with the United States Selective Service System, Local Board #39, Fairfax, Virginia. The petitioner was then a resident of Virginia. In 1964, petitioner became a full-time resident of Canada. Upon reaching his majority, the petitioner took an oath of allegiance to the West German Republic, obtained a German passport, and a visa to the United States on his German passport.

Petitioner was classified 1-A on November 13, 1968, by Local Board 39, Fairfax, Virginia. Petitioner appealed this classification, by writing the Local Board 39 that petitioner was an alien (German) not currently liable for military service, and entitled to a IVc classification. On January 31, 1969, Local Board #39 requested verification of German citizenship from petitioner which was supplied on February 10, 1969. On March 10, 1969 the Virginia State Headquarters requested the United States Department of State for a determination of petitioner's United States citizenship status. On March 9, 1970, Local Board #39 was informed the State Department Passport Office could not make determination of subject's present citizenship status, and that the Local Board registrant must continue to be considered a U.S. citizen and normal processing should resume. Subsequently, October 30, 1970, at request of the United States Department of State, petitioner executed a registration statement in Toronto, Canada,

under oath, in which he again stated that he had made a formal declaration of allegiance to Germany. On January 18, 1971, the Department of State advised the Selective Service System that it found the petitioner to be a citizen of the United States, and petitioner was thereafter ordered to report for induction into the Armed Forces of the United States by February 22, 1971.

MEMORANDUM BELOW

The United States Court of Appeals for the District of Columbia Circuit filed a one-page Memorandum Opinion on November 25, 1974. It is reprinted in its entirety in the Appendix attached hereto. This Opinion, which appears to be in conflict with *King v. Rogers*, 463 F.2d 1188 (9th Cir. 1972), relies on *Kawakita v. United States*, 343 U.S. 717, 723-24 (1952) to the effect that "The mere fact that (a dual national) asserts the right of one citizenship does not without more mean that he renounces the other." The key words here are "without more", for it was apparent in the record before the Court of Appeals that petitioner here had gone much farther than Kawakita including the taking of an oath before a U.S. Consul that he was electing to be a West German citizen.

REASONS FOR GRANTING THE WRIT

I. THE RULING OF THE LOWER COURT IS IN CONFLICT WITH RULINGS OF THIS COURT

Afroyim v. Rusk, 387 U.S. 268 (1967) held that Section 401(e) of the Nationality Act of 1940 as amended (54 Stat. 1168; 58 Stat. 746) was unconstitutional. This section provided that a person might be denaturalized merely by voting in a foreign election. The Court mentioned that which might seem to be self-evident (268):

> Our holding does no more than to give to this citizen that which is his own, a constitutional right to remain a citizen unless he voluntarily relinquishes that citizenship.

The present petitioner voluntarily took an oath of allegiance to the West German Republic, and in his communications with the Selective Service System, and the United States Department of State has constantly maintained many times that he intends to be a German national. Voluntary transfer of allegiance as was done by the petitioner here is the abandonment of citizenship. *Opinions of the Attorney General,* Vol. 42, Op. #34 at p. 3.

In *Savorgnan v. United States,* 338 U.S. 491 (1950), it appears that a native-born American woman became a naturalized Italian citizen, thereafter lived in Italy for about four years, and then sought to reclaim her United States citizenship. The Court ruled that in becoming naturalized, she had effectively renounced her American citizenship, which is undoubtedly what the petitioner did in the instant case. The only difference is that here the petitioner, being already possessed of dual nationality, did not have to go through a naturalization process to claim West German citizenship in the first instance.

By Act of July 27th, 1868, the Congress declared "the right of expatriation" to be "an inherent right of all people" (15 Stat. 223). Presently Title 8, U.S.C.A. Sec. 1481(a), codifies certain acts by which a person, whether by birth or naturalization shall lose his nationality. Here the petitioner has done three acts voluntarily, under Title 8 U.S.C.A. Secs. 1481(a)(1); (a)2, and (a)10, by which he shall lose his nationality. This case distinguishes from most reported cases, in that this petitioner is saying he is not a citizen of the United States. In *King v. Rogers,* 463 F.2d 1188

(1972), an expatriate failed to regain his nationality because he had taken an oath of allegiance to a foreign state, and informed the Selective Service System that he had no duty to serve in the Armed Services. This is precisely what the present petitioner has done.

Furthermore, he need not have taken the oath, provided in the statute, since that oath is not purported to be the sole method of accomplishing denaturalization or of giving up citizenship.

In *Rogers v. Bellei,* 401 U.S. 815, 835-836 (1971), the Supreme Court, in a summary of dual nationality cases, implies that a native born citizen may have a duty to elect, and that if Congress should make such a requirement, it would probably be Constitutional. Thus the United States has no specific statutory provision for election of citizenship by a dual national. The present petitioner has made his election to be a German national, and has done several voluntary acts by which he loses his United States citizenship. Petitioner argues that a person with dual nationality should be able to elect or choose one nationality he favors without fear, stigma, or penalty from the other.

Again as to dual nationality, *Perkins v. Elg.,* 307 U.S. 325 (1939), the Supreme Court states "Expatriation is a matter of intent on the part of the person concerned, which intent must be shown by some express act or from some other act from which it can be gathered." In *Rogers v. Bellei,* 401 U.S. 815, 835-836 (1971), the Court recapitulates *Perkins v. Elg* by providing that, on attaining his majority, he can elect to retain his citizenship and return to the United States and to resume its duties. The present petitioner informed the United States Department of State he intended to be a German national, and his

intent is shown by his taking an oath of allegiance to Bundes-Republik Deutschland, by using a West German passport, taking an oath before the United States Consular Service at Toronto, Canada of his intention to be a German national, absenting himself from the United States, and refusing to return to the United States and report for induction into the Armed Forces on grounds he is a German national. At least within the dicta of *Rogers v. Bellei,* and in *Perkins v. Elg,* the petitioner here has shown his intent to be a German national and conversely to lose his United States citizenship, and thus to have no duty to report for induction into the Armed Forces of the United States.

II. THE RULING OF THE DISTRICT OF COLUMBIA CIRCUIT APPEARS TO BE IN CONFLICT WITH THE NINTH CIRCUIT

The ruling of the United States Court of Appeals for the District of Columbia Circuit in the instant case appears to conflict with the ruling and opinion of the United States Court of Appeals for the Ninth Circuit in *King v. Rogers,* 463 F.2d 1188 (1972). This is a conflict that this Court should resolve, since a large number of dual-nationals undoubtedly refused to serve in the recent Vietnam conflict.

In *King v. Rogers* a native-born American citizen became a naturalized British subject while residing abroad. The Ninth Circuit held that proof of intent to renounce United States citizenship may be by "evidence of an explicit renunciation, Jolley v. Immigration and Naturalization Service, 441 F.2d 1245 (5th Cir. 1971), acts inconsistent with the United States citizenship, Baker v. Rusk, 296 F. Supp. 1028, 1033 (C.D. Cal., 1969), or by 'affirmative voluntary act(s) clearly manifesting a decision to accept (foreign) nationality . . . "

Karl Anton Pomeroy von Lewinski likewise was a "Fourteenth Amendment–first-sentence" citizen, but he had dual German nationality due to his father's citizenship at the time of his birth (and thereafter). He argues, under the *King* and other cited cases that he in fact has effectively waived and relinquished his rights to American citizenship and elected to be a citizen of the West German Republic. This he had a right to do, just as King had a right to be naturalized as a British subject.

CONCLUSION

Your petitioner says that the court below has decided questions affecting the administration of law in the Federal courts in a manner departing from the intention of the framers of the United States Constitution and its Amendments, and the statutes now in force, and that these questions are of general importance and have been decided in a manner departing from cognate cases.

Respectfully submitted,

MILLER WOODLIFF MARSHALL
102 Railway Labor Building
400 First Street, N.W.
Washington, D.C. 20001
638-3376

Attorney for Petitioner

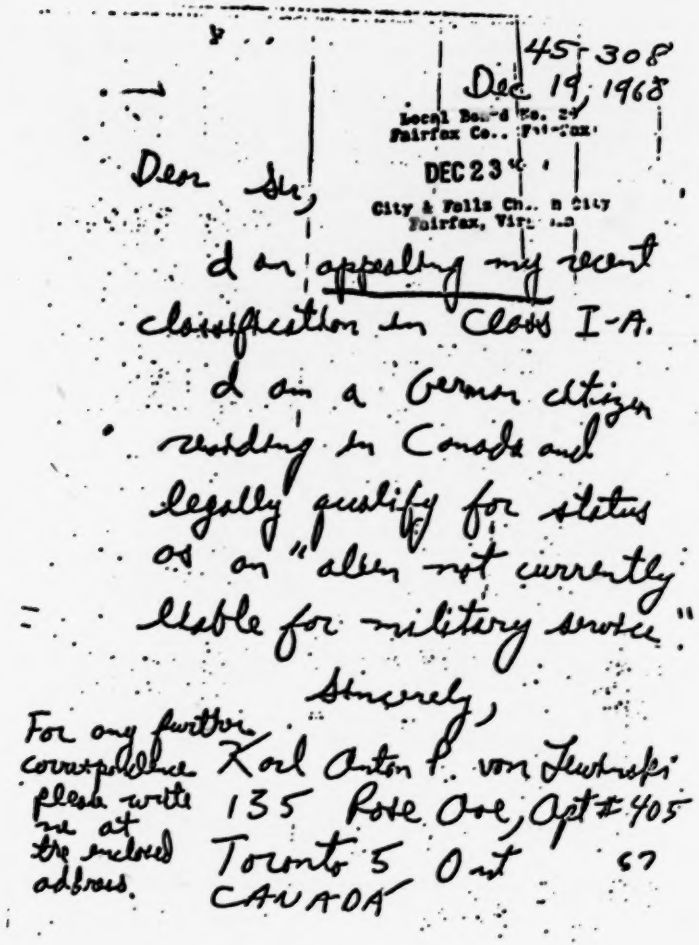
CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Petition, with Appendix attached thereto, was mailed by first class letter to the office of Earl Silbert, Acting United States Attorney, this _____ day of February, 1975.

_____

Miller Woodliff Marshall

APPENDIX



45-308

Dec 19, 1968

Local Board No. 24
Fairfax Co., Fairfax

DEC 23

City & Falls Ch... n City
Fairfax, Vir...

Dear Sir,

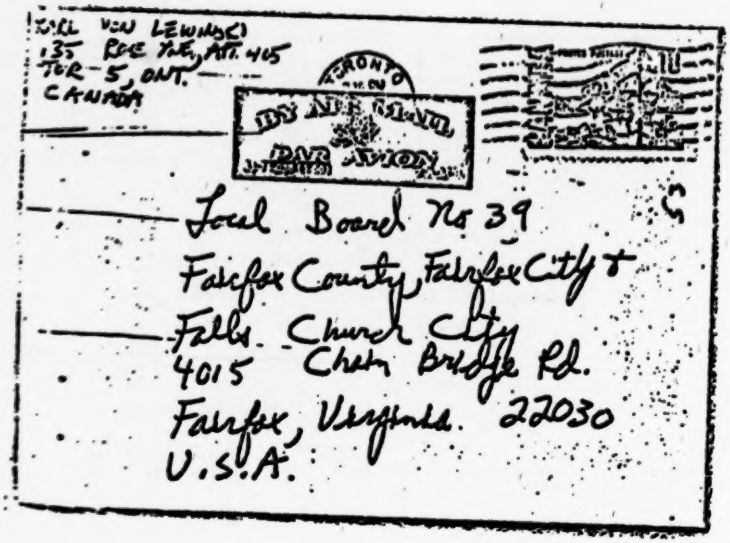
I am appealing my recent classification in Class I-A.

I am a German citizen residing in Canada and legally qualify for status as an "alien not currently liable for military service".

Sincerely,

Karl Anton P. von Lewinski
135 Pote Ave, Apt #405
Toronto 5 Ont
CANADA

For any further correspondence please write me at the enclosed address.



Local Board No 39
Fairfax County, Fairfax City +
Falls Church City
4015 Chain Bridge Rd.
Fairfax, Virginia 22030
U.S.A.

February 10, 1969

TO WHOM IT MAY CONCERN:

I hereby affirm I am a citizen of the Federal Republic of West Germany and have so declared my allegiance.

My citizenship was obtained at birth and derives from my father.

My father, Pomeroy Karl Anton von Lewinski, is a citizen by birth of West Germany and retains this citizenship to date.

Verification of his status is being forwarded directly by him.

I am and have been a resident of Canada over five years.

Sincerely,

Karl A.P. von Lewinski

Karl A.P. von Lewinski

Local Board No. 39
Fairfax Co., Fairfax

FEB 13 1969

City & Falls Church City
Fairfax, Virginia

United States Consulate General
360 University Avenue,
Toronto, Canada

CITIZENSHIP QUESTIONNAIRE
(Short Form)

Since you acquired United States citizenship (either at birth or by naturalization) have you:

1. Been naturalized as a citizen of Canada or any other foreign country? NO
2. Taken an oath of allegiance to any country other than the United States? YES
3. Entered or served in the armed forces of Canada or any other foreign country? NO
4. Worked for the Canadian or any other foreign government or any agency thereof, or for any Provincial or Municipal government or any agency thereof? YES
5. Obtained a passport or Certificate of Citizenship from the Canadian or any other foreign government? YES, (GERMAN
6. Sought or obtained any other benefit or privilege which is available only to Canadian nationals or nationals of another foreign state? NO

If you are a MALE BORN AFTER JULY 31, 1926, and are now 18 years or over, have you registered for SELECTIVE SERVICE? YES. If so, please give the following information:

When registered: MARCH, 1963 Reg. No. 44-39-45-30

Local Board number and address: BOARD No. 39,
4015 CHAIN BRIDGE RD.
FAIRFAX, VIRGINIA.

(date)

(Signature)

C-24
Rev. 4/15/70
Ref: 8 FAM ex. 224.12

United States Consulate General
360 University Avenue
Toronto 100, Canada

QUESTIONNAIRE

This Questionnaire will assist the Department of State in making a citizenship determination in your case. When completed it becomes part of the official records of the United States Government. You are requested to answer the questions to the best of your knowledge and belief. Before furnishing information in this Questionnaire, you may seek the advice of legal or other counsel of your own choice.

NOTE: The word "foreign" as used in this Questionnaire includes any country outside the United States.

1. (a) During your foreign residence, have you previously appeared at a consular office of the United States for any purpose? YES If "yes", give date of each appearance, place of such office and purpose of appearance. DECEMBER 1969 - TO OBTAIN U.S. VISA ON MY GERMAN PASSPORT

(b) Have you ever been denied a passport of the United States or registration on the ground that you were not a citizen of the United States? NO If "yes", give date, place and reason for denial. N/A

(c) Have you ever applied for a passport or registration as a citizen of the United States for any of your children? NO If "yes", give their names and the date, place and result of each application. N/A

(d) When and under what circumstances did you first become aware that you might be a citizen of the United States? I WAS BORN IN THE UNITED STATES IN 1945 AT DAYTONA BEACH, FLA.

(e) Have you ever informed any local or national official of a foreign state that you are a citizen of the United States? YES If "yes", give name and address of such official and the date and circumstances under which he was so informed. NUMEROUS OCCASIONS

2. Have you ever applied for naturalization as a citizen of a foreign state? NO If "yes", give the following information:

Date of application N/A.
Place of application _____
Date of approval by country _____
Nature of document issued _____
Identification or number of document _____

(Use the reverse of this sheet for any additional comments)

C-24
REV: 4/10/78

State why you applied for this naturalization and the specific circumstances under which your application was made. N/A.

Did you intend by this naturalization, to abandon your allegiance to the United States or transfer your allegiance to the foreign state? _____ Explain. N/A

3. Have you ever taken an oath or made an affirmation or other form... declaration of allegiance to a foreign state? YES If "yes", give the following information:

Date _____
Place GERMAN EMBASSY, CONSULATE, TORONTO
Purpose TO OBTAIN GERMAN PASSPORT

Why did you take the oath or affirmation? DUE TO THE FACT THAT I WAS BORN AND HAVE REMAINED A GERMAN CITIZEN
Did you attempt to avoid taking the oath or affirmation? NO.
If "yes", explain what you did and the name and address of any person having knowledge of your action. N/A

If you took no action, explain why you did not. I AM A CITIZEN OF WEST GERMANY. I DERIVE MY CITIZENSHIP FROM MY FATHER WHO WAS BORN AND REMAINS A W.GERMAN CITIZEN
Did you intend by this oath, or affirmation, to abandon your allegiance to the United States, or transfer your allegiance to the foreign state?
YES Explain. N/A I HAVE ALWAYS BEEN A CITIZEN OF GERMANY DUE TO THE FACT OF THE GERMAN NATIONALITY LAWS OF MY FATHER.

4. Have you ever entered or served in the armed forces of a foreign state? NO If "yes", give the following information:

Country N/A.
Date of Entry _____
Branch of Service _____
Date of Discharge _____
Why did you enter foreign Military Service? _____

(Use the reverse of this sheet for any additional comments)

C-24
Rev: 4/10/70

Did you try to avoid service? N/A If "yes", explain what you did, and give names and addresses of persons having knowledge of your action.
N/A

Did you intend, by this foreign military service, to abandon your allegiance to the United States or transfer your allegiance to the foreign state? N/A Explain N/A

5. Have you ever accepted, served in, or performed the duties of any office, post or employment under the government of a foreign state or political subdivision thereof? YES If "yes", give the following information regarding the post, office or employment:

Date employment or appointment began JULY 13-1970
Date terminated OCTOBER 19, 1970
Place or places of employment TORONTO AND OUT PROV
Title of position LABOUR STANDARDS OFFR.
Name of superior J.W. MCATEER, REGIONAL MG-
Description of duties FIELD INVESTIGATION

Name of Government Organization CANADIAN DEPT OF LABOR
Was an oath or affirmation of allegiance required for this position or employment? NO
Was your former nationality a prerequisite for this position?
NO

Why did you accept this employment? TO PURSUE MY CAREER.

Did you intend, by accepting or performing the duties of this office, post or employment, to transfer your allegiance to the foreign government or abandon your allegiance to the United States?
Explain. N/A

6. Since December 24, 1952, have you:
(a) sought or obtained registration as a citizen of a foreign country, applied for or obtained a passport, certificate, card, or other document therefrom in which you were described as a citizen of a country other than that of the United States? YES

(b) held any remunerative post or employment for which foreign nationality was or is a prerequisite? NO

(Use reverse of this sheet for any additional comments)

(c) been a member of any profession or organization for which foreign nationality was or is a prerequisite? NO

(d) claimed any other benefit of your foreign nationality? NO

If answer to any of these questions is "yes", give the following information:

Type of document or benefit N/A
Date sought
Date obtained
Date last used

Explain fully why you sought, obtained or used each benefit or document.
MY GERMAN PASSPORT IS NEEDED TO TRAVEL ABROAD.

Did you intend by seeking or claiming any one of these benefits, to transfer your allegiance to the foreign state or abandon allegiance to the United States? ____ Explain N/A

Jurat

I have (read) and read (to me) the foregoing questions and answers consisting of four pages in the ENGLISH language and I understand their contents. I also understand that this document becomes a part of the official records of the United States Government; also, that I may seek the advice of legal counsel prior to signing it under oath.

I solemnly swear that the answers and explanations made by me in this questionnaire and in any attachments which are referred to herein are true to the best of my knowledge and belief.

Signature of Applicant

"Subscribed and sworn to before me this OCT 30 1970 day of _____, 19____. The whole of the above having been first read and explained to the said _____, who appeared perfectly to understand the same, he signed (or made his mark) in my presence."

Signature

WARREN E. WILLS
Consul of the
Title United States of America

(Use the reverse of this sheet for any additional comments)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
Civil Division

KARL ANTON POMEROY VON LEWINSKI
1660 Bathurst Street, #33
Toronto, Ontario, Canada,
Plaintiff

VS.

Civil Action No. 2562-72

Byron V. Pepitone, as Acting Director, (1)
National Headquarters
Selective Service System
1724 F Street, N.W., 20435, and

Linwood G. Wilhelm, as State Director, (2)
Selective Service System
Richmond, Virginia 23240, and

Keith Dengler, As Chairman and (3)
Betty Joe Lundy, Frank Cockerille and
Dwight L. Hubbard, and Donald H. Shaner,
as Members of Local Board No. 39,
Selective Service, Fairfax County,
Fairfax City, and Falls Church City
3251 Old Lee HighWay
Fairfax, Virginia 22030, and

Richard G. Kleindienst, as Attorney General
of the United States
Department of Justice
9th & Constitution Avenue, N.W.
Washington, D.C. 20001 and

William P. Rogers, as Secretary of State,
Department of State
2201 C Street, N.W.
Washington, D.C. 20520
Defendants

COMPLAINT FOR DECLARATORY JUDGMENT, MANDAMUS, INJUNCTIVE AND/OR RESTRAINING RELIEF

Comes now the plaintiff, by his attorney, John W. Brennan, and requests the above named defendants be restrained and/or enjoined from inducting the plaintiff into the Armed Forces of the United States, and from criminal prosecution of the plaintiff for plaintiff's failure to comply with an induction order issued by the defenants acting in their capacities as officers of the Selective Service of the United States, and as officers, agents and employees of the United States acting in his official capacity; and for a judgment declaring the plaintiff is not a citizen of the United States and not presently subject to induction into the Armed Forces of the United States on the following grounds and reasons:

JURISDICTION

1. Jurisdiction and venue for this action exist in this Court, is founded in District of Columbia Code Sec. 11-521, and Title 28 U.S. Code Sec. 1391. Jurisdiction for Declaratory Judgment is founded upon Title 28, U.S. Code Sec. 2201 because a federal question exists within the meaning of Title 28, U.S. Code Sec. 1331 in that this action arises under the Constitution of the United States; and specifically under the First, Fifth, and Sixth Amendments and under Sections 1 of Articles 1, 2, and 3 of the Constitution; and also under the Universal Military Training and Service Act of 1967, 50 U.S. Code App., Sec. 451, et seq., specifically Title III Nationality and Naturalization, Sections 301 through 407. Plaintiff has

exhausted his administrative remedies. The matter in controversy exceeds the value of $10,000.00 exclusive of interest and costs; and arises under the laws of the United States.

STATEMENT OF FACTS

2. Plaintiff had been ordered to report for induction into the Armed Forces of the United States before February 22, 1971 by defendants numbered 1, 2, 3, or these defendants will have defendant numbered 4 begin criminal prosecution against the plaintiff.

3. Plaintiff upon receipt of initial order for induction into the Armed Services of the United States informed the defendants, numbered 2 and 3, that plaintiff was a citizen of the Bundes-Republik Deutchland; and that plaintiff had taken an oath of allegiance to the German Republic. The initial order was stayed pending appeal to defendant number 1; that defendant number 5 informed defendants 1, 2, and 3 that plaintiff was in fact a citizen of the United States and as a result thereof plaintiff was ordered to report for induction.

4. Plaintiff was born in the United States of America on February 24, 1945, at Daytona Beach, Florida, of an American citizen, to-wit, his mother, and of a German enemy alien. Plaintiff's father entered the United States on a diplomatic passport issued by the Weimar Republic. Plaintiff, upon attaining eighteen years of age, registered with Local Selective Service Board No. 39 at 4015 Chain Bridge Road, Fairfax, Virginia, and was issued Registration No. 44-39-45-308. Plaintiff left the United States in 1964, and took up permanent residence in Canada. In 1969, plaintiff obtained a German passport and that plaintiff

took oath of allegiance to the Bundes-Republik Deutchland. Plaintiff filed with the United States Consulate General at 360 University Avenue, Toronto, Canada, a citizenship questionnaire form wherein it is stated plaintiff is a citizen of Germany with a German passport.

5. That the classification of plaintiff as I-A is based on erroneous information that plaintiff is a citizen of the United States; and that plaintiff as an alien residing outside the United States should be classified as IV-C, and that defendants have illegally refused and are illegally refusing to classify the plaintiff IV-C.

Unless relief is granted by this action, the plaintiff will suffer the irreparable injury of being illegally inducted into military service. The plaintiff has exhausted all administrative remedies.

THEREFORE, plaintiff demands judgment

(1) that plaintiff is not subject to induction in the Armed Forces of the United States;

(2) that defendants cancel and rescind the induction order now outstanding against plaintiff and enjoin the issuance of any new induction order against him so long as he is an alien residing outside of the United States;

(3) that defendants be compelled to classify the plaintiff IV-C;

(4) enjoining and restraining defendant Richard G. Kleindienst from prosecuting the plaintiff for his alleged failure to submit to induction on or before February 22, 1971, and grant such other relief as to the Court may seem fit and proper.

Plaintiff also requests a preliminary injunction enjoining defendants, pending the determination of this action, from keeping in effect the outstanding induction order against plaintiff and from issuing any other induction order against him; and that the defendant, Richard G. Kleindienst, be enjoined and restrained temporarily from the criminal prosecution against plaintiff pending the outcome of this Petition.

/s/ John W. Brennan
John W. Brennan
613 National Press Building
14th & F Streets, N.W.
Washington, D.C. 20005
RE 7-7747

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

KARL ANTON PONEROY VON LEWINSKI
Plaintiff,

—v—

BYRON V. PEPITONE, *et al.*,
Defendants.

Civil Action No. 2562-72

ANSWER

Defendants by their attorney, the United States Attorney for the District of Columbia, answer the complaint as follows:

1. As for the jurisdictional allegations contained in §1 of the complaint: Admit that the Court has jurisdiction to determine the issue presented by this litigation as to plaintiff's status as a United States citizen.

2-4. Upon the basis of the administrative record documents, admit the allegations contained in §§2-4 of the complaint, except that it is denied that plaintiff took up permanent residence in Canada in 1964.

5. Deny the allegations contained in §5 of the complaint; affirmatively aver that under *Afroyim v. Rusk*, 387 U.S. 253 (1967), plaintiff has not voluntarily relinquished the United States citizenship he acquired by birth in the United States, and defendants must continue to recognize his United States citizenship.

6. As for the allegations contained in §6 of the complaint: Admit that plaintiff has exhausted his administrative remedies.

/s/ Harold H. Titus, Jr.
HAROLD H. TITUS, JR.
United States Attorney

/s/ Arnold T. Aikens
ARNOLD T. AIKENS
Assistant United States Attorney

/s/ Gil Zimmerman
GIL ZIMMERMAN
Assistant United States Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that service of the foregoing Answer has been made upon plaintiff by mailing a copy thereof to his attorney, John W. Brennan, Esq., 613 National Press Building, 14th & F Streets, N.W., Washington, D.C. 20005, this 1st day of June, 1973.

/s/ Gil Zimmerman
GIL ZIMMERMAN
Assistant United States Attorney
U.S. Courthouse
Room 3431
Washington, D.C. 20001
Telephone: 202–426-7351

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

KARL ANTON PONEROY VON LEWINSKI *Plaintiff,*	)	
–v–	)	**Civil Action No. 2562-72**
BYRON V. PEPITONE, *et al.,* *Defendants.*	)	

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendants by their attorney, the United States Attorney for the District of Columbia, respectfully move the Court to grant them summary judgment, on the ground that no genuine issue of material fact exists, and they are entitled to judgment as a matter of law.

Incorporated herein are the annexed Government exhibits:

Government Exhibit No.	Description
1	Documents from the Selective Service file relating to plaintiff case
2	State Department documents relating to plaintiff's questioning our country's continuing to recognize him as a United States citizen.

In support hereof, defendants submit the annexed Statement of Material Facts and Memorandum of Points and Authorities.

/s/ Harold H. Titus, Jr.
HAROLD H. TITUS, JR.
United States Attorney

/s/ Arnold T. Aikens
ARNOLD T. AIKENS
Assistant United States Attorney

/s/ Gil Zimmerman
GIL ZIMMERMAN
Assistant United States Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that service of the foregoing Defendants' Motion for Summary Judgment, Defendants' Statement of Material Facts, Memorandum of Points and Authorities in support thereof, Government Exhibits 1 and 2, and proposed Judgment has been made upon plaintiff by mailing a copy thereof to plaintiff's attorney, John W. Brennan, Esquire, 613 National Press Building, 14th & F Streets, N.W., Washington, D.C. 20005, this 1st day of June, 1973.

/s/ Gil Zimmerman
GIL ZIMMERMAN
Assistant United States Attorney
U.S. Courthouse
Room 3431
Washington, D.C. 20001
Telephone: 202–426-7351

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

KARL ANTON PONEROY VON LEWINSKI)
Plaintiff,)
)
—v—) **Civil Action No. 2562-72**
)
)
BYRON V. PEPITONE, *et al.,*)
Defendants.)

DEFENDANTS' STATEMENT OF MATERIAL FACTS

Preliminary Statement

In defendants' view, there is but a single issue presented for judicial determination in this litigation: Whether plaintiff has voluntarily relinquished the United States citizenship he acquired at birth (having been born in the United States, subject to its jurisdiction), by some action on his part, sufficient under *Afroyim v. Rusk,* 387 U.S. 253 (1967), to effectuate his expatriation as a United States citizen?

The Selective Service file documents (Govt. Ex. 1) and the State Department documents (Govt. Ex. 2) establish the following as the undisputed material facts, on which summary judgment should now be granted in defendants' favor:

The Material Facts

1. Plaintiff was born in Daytona Beach, Florida, on February 24, 1945 of a United States citizen mother, and a German alien father (then in this country as an Enemy Alien). Thus, he was a dual national at the time of his birth in 1945:

(a) Having been born in this country, subject to the jurisdiction of the United States, plaintiff acquired United States citizenship at birth by operation of the Fourteenth Amendment to the Constitution.

(b) By virtue of his father's German citizenship, plaintiff at birth acquired German citizenship under German municipal law (following the principle of *Jus Sanguinis*).

2. After reaching the age of eighteen, plaintiff registered under our Selective Service System on March 6, 1963. He then gave as his residence address Alexandria, Virginia. Jurisdiction over him as a Selective Service registrant thereupon vested in Selective Service Local Board No. 39, Fairfax, Virginia ("Local Board").

3. On June 1, 1964 plaintiff executed a Selective Service "classification questionnaire", which was returned to his Local Board. He therein disclosed –

(a) That he was a United States citizen. Series I, Item 4. (He then gave no indication of his German citizenship.)

(b) That his parents were then residing at the same Alexandria, Virginia address he then gave as his own address. Series IV.

(c) That he was then a high-school graduate; that he was attending as a full-time student the University of

Western Ontario, London, Ontario, Canada; and that he expected to receive a degree in 1970 or 1971. Series IX.

(d) That he deemed the questions addressed to alien registrants not applicable in his case. Series X.

4. The Local Board initially classified plaintiff "1-A". He was given a physical examination on September 15, 1966, and on October 20, 1966 his classification was changed to "2-S". (He was then a full-time student at the University of Western Ontario, London, Canada.) He remained in "2-S" classification until November 13, 1968, when his classification was changed to "1-A".

5. Plaintiff on December 19, 1968 took an appeal from his "1-A" reclassification. In his appeal letter, he stated to the Local Board:

* * * * *

> I am a German citizen residing in Canada and legally qualify for status as an "alien not currently liable for military service".

6. The Selective Service Appeal Board on January 14, 1969 affirmed plaintiff's "1-A" reclassification. This was followed by the Local Board on January 29, 1969 ordering plaintiff to report for induction into the Armed Forces of the United States.

7. However, on January 31, 1969 the Local Board wrote plaintiff, asking him to "submit verification of *** [his]*** German Citizenship", and advising him that, when this was submitted, his "file will be reconsidered by board members for reclassification."

8. Plaintiff on February 10, 1969 wrote a "To Whom It May Concern" letter, received by his Local Board on February 13, 1969, stating:

> I hereby affirm I am a citizen of the Federal Republic of West Germany and have so declared my allegiance.
>
> My citizenship was obtained at birth and derives from my father.
>
> My father *** is a citizen by birth of West Germany and retains this citizenship to date.
>
> Verification of his status is being forwarded directly by him.
>
> I am and have been a resident of Canada over five years.

His father wrote a letter, also dated February 10, 1969, and received by the Local Board on February 13, 1969, explaining the reasons why his son had chosen "to pledge his allegiance to Germany." With this letter, plaintiff's father enclosed copies of his own birth certificate and current German passport.

9. On March 12, 1969 the Local Board postponed plaintiff's induction into the Armed Forces of the United States, pending determination as to his United States citizenship status. Selective Service National Headquarters requested the Department of State to make such a determination.

10. On May 2, 1970 plaintiff's attorney wrote the Local Board, stating (in part) that–

* * * * *

*** [Plaintiff]*** was born in the United States, but was [then]of dual nationality because his father was and still is a German alien. *** [He] *** has been in Canada for approximately six years except for brief visits to his parents and friends in this country. He has pursued his option to be of German nationality and holds a German passport.

It is his position that as a German national, not a resident in this country for the last several years, he is not liable to the provisions of the Selective Service Act.

11. Plaintiff on October 30, 1970 executed a "citizenship questionnaire" and application for registration, to assist the State Department in reaching a determination as to his United States citizenship status. In executing that questionnaire and application, plaintiff represented:

(a) That he had "taken an oath or made an affirmation or other formal declaration of allegiance" to Germany in order "to obtain [a]German passport"; that he did this "due to the fact that *** [he]*** was born and *** [had] *** ALways remained a German citizen"; and that he was "a citizen of West Germany", deriving that citizenship through his father.

(b) That he had from July 13, 1970 to October 9, 1970 been employed in Toronto, Ontario, Canada as a Labor Standards Representative with the Canadian Department of Labour, but that no oath or affirmation of alle legiance was required for such employment.

(c) (In substance) that in no other way had he acted so as to raise a question as to his continuing to be recognized as a United States citizen.

12. On January 18, 1971 the State Department advised the Selective Service System that the State Department had "resolved" plaintiff's case by having "found *** [him]*** to be an American citizen." Plaintiff was notified on January 21, 1971 as to this State Department determination continuing to recognize him as a United States citizen.

13. On February 2, 1971 the Local Board called upon plaintiff to report to the Local Board "at the soonest possible time" in compliance with the order for his induction into the Armed Forces of the United States. Plaintiff did not report as directed.

14. Plaintiff seeks in this litigation a judicial determination that the Stae Department's continued recognition of him as a United States citizen is erroneous. He asserts in his complaint –

(a) That he "left the United States in 1964, and took up permanent residence in Canada".[1] (§4 of the complaint.)

(b) That in 1969 he "obtained a German passport" and took an "oath of allegiance to the Bundes-Republik Deutchland." (Idem.)

---

[1] The claim that plaintiff took up permanent residence in Canada as early as 1964 goes contrary to the facts disclosed in the administrative records before this Court. But we think this claim is irrelevant. Accordingly, we perceive no need for this Court to resolve this factual issue here.

(c) That plaintiff is entitled to be classified "IV-C" as an "alien residing outside of the United States". (§5 of the complaint.)

15. Pursuant to the informal understanding reached between counsel, the Selective Service System has instructed the Local Board to hold in abeyance reporting to the appropriate United States Attorney plaintiff's failure to report for induction, as ordered by the Local Board, pending judicial resolution of the claim here raised by plaintiff that the State Department had erred in determining that plaintiff must continue to be recognized as a United States citizen.

/s/ Harold H. Titus, Jr.
HAROLD H. TITUS, JR.
United States Attorney

/s/ Arnold T. Aikens
ARNOLD T. AIKENS
Assistant United States Attorney

/s/ Gil Zimmerman
GIL ZIMMERMAN
Assistant United States Attorney

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

KARL ANTON PONEROY VON LEWINSKI)
Plaintiff,)
)
–v–) **Civil Action No. 2562-72**
)
BYRON V. PEPITONE, *et al.,*)
Defendants.)

JUDGMENT

This cause having come before the Court on defendants' motion for summary judgment; the Court having considered the record, having reviewed the administrative record documents, and having concluded that no genuine issue of material fact exists, and that defendants are entitled to judgment as a matter of law,

It is by the Court this 1st day of November, 1973,

ORDERED AND ADJUDGED:

1. That defendants' motion for summary judgment be, and the same hereby is, granted; and

2. That this action be, and the same hereby is, dismissed.

/s/ Joseph E. Waddy
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ANTON POMEROY VONLEWINSKI
Plaintiff

vs.

Civil Action
No. 2562-72

BYRON V. PEPITONE, *et al.*,
Defendant

NOTICE OF APPEAL

Notice is hereby given this 27th day of November, 1973, that Karl Anton Pomeroy Von Lewinski, plaintiff herein appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 1st day of November 1973 in favor of Byron V. Pepitone et al., defendants against said Karl Anton Pomeroy Von Lewinski, plaintiff.

John W. Brennan
Attorney for plaintiff
613 National Press Building
Washington, D.C. 20004

HAROLD H. TITUS, JR.
United States Attorney
U.S. Courthouse
Washington, D.C. 20001

GIL ZIMMERMAN
Assistant United States Attorney
U.S. Courthouse
Washington, D.C. 20001

Attorneys for defendants

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 74-1017 **SEPTEMBER TERM, 1974**

Civil 2562-72

Karl Anton Poneroy Von Lewinski,
Appellant

v.

Byron V. Pepitone, as Acting Director,
National Headquarters
Selective Service Systems, *et al.*,

ORDER

On consideration of the record, the briefs, and all of the pleadings and proceedings had herein, and it appearing that the above case falls within the intent and purpose of Rule 11(e) of the General Rules of this Court, it is

ORDERED by the Court, *sua sponte,* that the above case, presently scheduled for argument on November 22, 1974, will be considered and decided without oral argument.

Motions for restoration to the argument calendar will not ordinarily be entertained by the Court.

Counsel will be notified at a later date of the division of the Court considering this matter.

Per Curiam

For the Court:

HUGH E. KLINE, Clerk

By: /s/ R.A. Bonner
Robert A. Bonner
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 73-1017 September Term, 1974
Civil 2562-72

Karl Anton Poneroy Von Lewinski,
Appellant

v.

Byron V. Pepitone, as Acting Director,
National Headquarters
Selective Service System, *et al.*,

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Before: Bazelon, Chief Judge, Danaher, Senior Circuit Judge and Justice,* United States District Judge for the Eastern District of Texas

JUDGMENT

This cause came on for consideration on the record on appeal from the United States District Court for the District of Columbia and briefs were filed by the parties. On consideration of the foregoing, it is

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*Sitting by designation pursuant to 28 U.S.C. §292(d).

ORDERED AND ADJUDGED by this Court that the judgment of the District Court appealed from in this case cause is hereby affirmed, for the reasons set forth in the attached memorandum.

Per Curiam
For the Court

/s/ Hugh E. Kline
Hugh E. Kline
Clerk

74-1017 Lewinski v. Pepitone

Appellant's complaint for declaratory judgment and other relief claims that he had no duty to obey appellees' order to report for induction into the United States Army. He asserts that certain acts performed by him constitute a relinquishment of his American citizenship and that, as an alien he is therefore ineligible for military duty. The trial court granted summary judgment for the appellee. We affirm the trial court's ruling.

Expatriation requires a voluntary act by which an American citizen unequivocally indicates relinquishment of United States citizenship. *Trop v. Dulles,* 356 U.S. 86, 92 (1958); *Peter v. Secretary of State,* 347 F. Supp. 1035, 1038 (D.D.C. 1972) (three-judge court); See *Afroyim v. Rusk,* 387 U.S. 253, 268 (1967). Appellant claims that (a) his taking of an oath of allegiance to the West Germany Republic in connection with the obtaining of a German passport; and (b) his informing of U.S. Government officials of his intention to be a German national constitute such acts. We disagree. Appellant was a dual national at birth. His father was German and his mother American. Neither of the acts which he claims constitutes relinquishment of citizenship are necessarily any more than the assertion of his status as a dual national and the exercise of his rights as such.[1] "The mere fact that [a dual national] asserts the right of one citizenship does not without more mean that he renounces the other." *Kawakita v. United States,* 343 U.S. 717, 723-24.[2]

---

[1] Appellant refused to follow the means that he knew were available to him to explicitly renounce his American citizenship. *See* 8 U.S.C. §1481(a)(6).

[2] Appellant offers no support for his further claim that his having resided in Canada for five years constitutes a relinquishment of his American citizenship. We have examined the claim and find it to be without merit.

Naturalization court, see section 1101(a)(24) of this title.
Service, see section 1101(a)(34) of this title.
United States, see section 1101(a)(38) of this title.

§1456. Repealed. Pub. L. 86-682, §12(c), Sept. 2, 1960, 74 Stat. 708, eff. Sept. 1, 1960.

Section, act June 27, 1952, ch. 477, title III, ch. 2, §345, 66 Stat. 266, related to free transmittal of official mail in naturalization matters. See sections 4152 and 5003 of Title 39, The Postal Service.

§1457. Publication and distribution of citizenship textbooks; use of naturalization fees.

Authorization is granted for the publication and distribution of the citizenship textbook described in subsection (b) of section 1443 of this title and for the reimbursement of the appropriation of the Department of Justice upon the records of the Treasury Department from the naturalization fees deposited in the Treasury through the Service for the cost of such publication and distribution, such reimbursement to be made upon statements by the Attorney General of books so published and disgributed. (June 27, 1952, ch. 477, title III, ch. 2, §346, 66 Stat. 266.)

CROSS REFERENCES

Definition of the term–
Attorney General, see section 1101(a)(5) of this title.
Naturalization, see section 1101 (a)(23) of this title.
Service, see section 1101(a)(34) of this title.

§1458. Compilation of naturalization statistics and payment for equipment.

The Attorney General is authorized and directed to prepare from the records in the custody of the Service a report upon those heretofore seeking citizenship to show by nationalities their relation to the numbers of aliens annually arriving and to the prevailing census populations of the

foreign-born, their economic, vocational, and other classification, in statistical form, with analytical comment thereon, and to prepare such report annually hereafter. Payment for the equipment used in preparing such compilation shall be made from the appropriation for the enforcement of this chapter by the Service. (June 27, 1952, ch. 477, title III, ch. 2, §347, 66 Stat. 266.)

EFFECTIVE DATE

Section effective 180 days after June 27, 1952, see section 407 of act June 27, 1952, set out as a note under section 1101 of this title.

CROSS REFERENCES

Definition of the term–
Alien, see section 1101(a)(3) of this title.
Attorney General, see section 1101(a)(5) of this title.
Naturalization, see section 1101(a)(23) of this title.
Service, see section 1101(a)(34) of this title.

§1459. Admissibility in evidence of statements voluntarily made to officer or employees in the course of their official duties; failure of clerk of court to do duty; penalties.

(a) It shall be lawful and admissible as evidence in any proceedings founded under this subchapter, or any of the penal or criminal provisions of any law relating to immigration, naturalization, or citizenship, for any officer or employee of the United States to render testimony as to any statement voluntarily made to such officer or employee in the course of the performance of the official duties of such officer or employee by any defendant at the time or subsequent to the alleged commission of any crime or offense which may tend to show that such defendant did not have or could not have had knowledge of any matter concerning which such defendant is show to have made affidavit, or oath, or to have been a witness pursuant to such law or laws.

(b) In case any clerk of court shall refuse or neglect to comply with any of the provisions of section 1450(a)(b), or (c) of this title, such clerk of court shall forfeit and pay to the United States the sum of $25 in each and every case in which such violation or omission occurs and the amount of such forfeiture may be recovered by the United States in a civil action against such clerk.

(c) If any clerk of court shall fail to return to the Service or properly account for any certificate of naturalization furnished by the Service as provided in subsection (d) of section 1450 of this title, such clerk of court shall be liable to the United States in the sum of $50, to be recovered in a civil action for each and every such certificate not properly accounted for or returned. (June 27, 1952, ch. 477, title III, ch. 2, §348, 66 Stat. 267.)

CROSS REFERENCES

Definition of the term–
Clerk of court, see section 1101(a)(7) of this title.
Service, see section 1101(a)(34) of this title.

FEDERAL RULES OF CIVIL PROCEDURE

Civil action, one form of action, see rule 2, Title 28, Appendix, Judiciary and Judicial Procedure.

PART III. – LOSS OF NATIONALITY

§1481. Loss of nationality by native-born or naturalized citizen; voluntary action; burden of proof; presumptions.

(a) From and after the effective date of this chapter a person who is a national of the United States whether by birth or naturalization, shall lose his nationality by–

(1) obtaining naturalization in a foreign state upon his own application, upon an application filed in his behalf by a parent, guardian, or duly authorized agent, or through

the naturalization of a parent having legal custody of such person: *Provided,* That nationality shall not be lost by any person under this section as the result of the naturalization of a parent or parents while such person is under the age of twenty-one years, or as the result of a naturalization obtained on behalf of a person under twenty-one years of age by a parent, guardian, or duly authorized agent, unless such person shall fail to enter the United States to establish a permanent residence prior t his twenty-fifth birthday: *And provided further,* That a person who shall have lost nationality prior to January 1, 1968, through the naturalization in a foreign state of a parent or parents, may, within one year from the effective date of this chapter apply for a visa and for admission to the United States as a nonquota immigrant under the provisions of section 1101(a)(27(E) of this title; or

(2) taking an oath or making an affirmation or other formal declaration of allegiance to a foreign state or a political subdivision thereof; or

(3) entering, or serving in, the armed forces of a foreign state unless, prior to such entry or service, such entry or service is specifically authorized in writing by the Secretary of State and the Secretary of Defense: *Provided,* That the entry into such service by a person prior to the attainment of his eighteenth birday shall serve to expatriate such person only if there exists an option to secure a release from such service and such person fails to exercise such option at the attainment of his eighteenth birday; or

(4) (A) accpeting, serving in, or performing the duties of any office, post, or employment under the government of a foreign state or a political subdivision thereof, if he has or acquires the nationality of such foreign state; or

(B) accepting, serving in, or performing the duties of any office, post, or employment under the government of a foreign state or a political subdivision thereof, for which office, post, or employment an oath, affirmation, or declaration of allegiance is required; or

(5) voting in a political election in a foreign state or participating in an election or plebiscite to determine the sovereignty over foreign territory; or

(6) making a formal renunciation of nationality before a diplomatic or consular officer of the United States in a foreign state, in such form as may be prescribed by the Secretary of State; or

(7) making in the United States a formal written renunciation of nationality in such form as may be prescribed by, and before such officer as may be designated by, the Attorney General, whenever the United States shall be in a state of war and the Attorney General shall approve such renunciation as not contrary to the interests of national defense; or

(8) deserting the military, air, or naval forces of the United States in time of war, if and when he is convicted thereof by court martial and as the result of such conviction is dismissed or dishonorably discharged from the service of such military, air, or naval forces: *Provided*, That, notwithstanding loss of nationality or citizenship under the terms of this chapter or previous laws by reason of desertion committed in time of war, restoration to active duty with such military, air, or naval forces in time of war or the reenlistment or induction of such a person in time of war with permission of competent military, air, or naval authority shall be deemed to have the immediate effect of restoring such nationality or citizenship heretofore or hereafter so lost; or

(9) committing any act of treason against, or attempting by force to overthrow, or bearing arms against, the United States, violating or conspiring to violate any of the provisions of section 2383 of Title 18 or willfully performing any act in violation of section 2385 of Title 18, or violating section 2384 of Title 18 by engaging in a conspiracy to overthrow, put down, or to destroy by force the Government of the United States, or to levy war against them, if and when he is convicted thereof by a court martial or by a court of competent jurisdiction; or

(10) departing from or remaining outside of the jurisdiction of the United States in time of war or during a period declared by the President to be a period of national emergency for the purpose of evading or avoiding training and service in the military, air, or naval forces of the United States. For the purposes of this paragraph failure to comply with any provision of any compulsory service laws of the United States shall raise the presumption that the departure from or absence from the United States was for the purpose of evading or avoiding training and service in the military, air, or naval forces of the United States.

(b) Any person who commits or performs any act specified in subsection (a) of this section shall be conclusively presumed to have done so voluntarily and without having been subjected to duress of any kind, if such person at the time of the act was a national of the state in which the act was performed and had been physically present in such state for a period or periods totaling ten years or more immediately prior to such act.

(c) Whenever the loss of United States nationality is put in issue in any action or proceeding commenced on or after September 26, 1961 under, or by virtue of, the

provisions of this chapter or any other Act, the burden shall be upon the person or party claiming that such loss occurred, to establish such claim by a preponderance of the evidence. Except as otherwise provided in subsection (b) of this section, any person who commits or performs, or who has committed or performed, any act of expatriation under the provisions of this chapter or any other Act shall be presumed to have done so voluntarily, but such presumption may be rebutted upon a showing, by a preponderance of the evidence, that the act or acts committed or performed were not done voluntarily. (June 27, 1952, ch. 477, title III, ch. 3, §349, 66 Stat. 267; Sept. 3, 1954, ch. 1256, §2, 68 Stat. 1146; Sept. 26, 1961, Pub. L. 87-301, §19, 75 Stat. 656.)

AMENDMENTS

1961–Subsec. (c). Pub. L. 87-301 added subsec. (c).

1954–Subsec. (a) (9). Act Sept. 3, 1954, provided for forfeiture of citizenship of person s advocating the overthrow of the Government by force or violence.

EFFECTIVE DATE

Chapter effective 180 days after June 27, 1952, see section 407 of act June 27, 1952, set out as a note under section 1101 of this title.

SHORT TITLE

Section 1 of act Sept. 3, 1954, provided that the amendment of subsec. (a)(9) by section 2 of the act Sept. 3, 1954, should be popularly known as the "Expatriation Act of 1954".

RIGHT OF EXPATRIATION

R.S. §1999 provided that: "Whereas the right of expatriation in a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness; and whereas in the recognition of this principle this Government has freely received emigrants from all nations, and invested them with the rights of citizenship; and whereas it is claimed that such American citizens,

with their descendants, are subjects of foreign states, owing allegiance to the governments thereof; and whereas it is necessary to the maintenance of public peace that this claim of foreign allegiance should be promptly and finally disavowed: Therefore any declaration, instruction, opinion, order, or decision of any officer of the United States which denies, restricts, impairs, or questions the right of expatriation, is declared inconsistent with the fundamental principle of the Republic."

CROSS REFERENCES

Definition of the term–

Attorney General, see section 1101 (a)(6) of this title.
Consular officer, see section 1101(a)(9) of this title.
Foreign state, see section 1101(a)(14) of this title.
National, see section 1101(a)(23) of this title.
National of the United States, see section 1101(a)(22) of this title.
Naturalization, see section 1101(a)(23) of this title.
Parent, see section 1101(b)(2)(c)(2) of this title.
United States, see Section 1101(a)(38) of this title.
Treason, sedition and subversive activities, see chapter 115 of Title 18, Crimes and Criminal Procedure.

§1482. Dual nationals; divestiture of nationality.

A person who acquired at birth the nationality of the United States and of a foreign state and who has voluntarily sought or claimed benefits of the nationality of any foreign state shall lose his United States nationality by hereafter having a continuous residence for three years in the foreign state of which he is a national by birth at any time after attaining the age of twenty-two years unless he shall–

(1) prior to the expiration of such three-year period, take an oath of allegiance to the United States before a United States displomatic[1] or consular officer in a manner prescribed by the Secretary of State; and

---

[1] So in original. Probably should read "diplomatic".

(2) have his residence outside of the United States solely for one of the reasons set forth in paragraphs (1), (2)–(7), or (8) of section 1485 of this title, or paragraph (1) or (2) of Section 1486 of this title: *Provided, however,* That nothing contained in this section shall deprive any person of his United States nationality if his foreign residence shall begin after he shall have attained the age of sixty years and shall have had his residence in the United States for twenty-five years after having attained the age of eighteen years.

(June 27, 1952, ch. 477, title III, ch. 3, §350, 66 Stat. 269.)

EFFECTIVE DATE

Section effective 180 days after June 17, 1952, see section 407 of act June 27, 1952, set out as a note under section 1101 of his title.

RIGHT OF EXPATRIATION

Provisions preserving the right, see R.S. §1999 set out as a note under section 1481 of this title.

CROSS REFERENCES

Definition of the term–
Consular officer, see section 1101 (a)(9) of this title.
Foreign state, see section 1101(a)(14) of this title.
National of the United States, see section 1101(a)(22) of this title.
Residence, see section 1101(a)(33) of this title.
United States, see section 1101(a)(38) of this title.

§1483. Restrictions on expatriation.

(a) Except as provided in paragraphs (7)–(9) of section 1481 of this title, no national of the United States can expatriate himself, or be expatriated, under this chapter while within the United States or any of its outlying possessions, but expatriation shall result from the performance within the United States or any of its outlying possessions of any of the acts or the fulfillment of any of

the conditions specified in this Part if and when the national thereafter takes up a residence outside the United States and its outlying possessions.

(b) A national who within six months after attaining the age of eighteen years asserts his claim to United States nationality, in such manner as the Secretary of State shall by regulation prescribe, shall not be deemed to have expatriated himself by the commission, prior to his eighteenth birthday, of any of the acts specified in paragraphs (2) and (4)–(6) of section 1481 (a) of this title. (June 27, 1952, ch. 477, title III, ch. 3, §351, 66 Stat. 269.)

RIGHT OF EXPATRIATION

Provisions preserving the right, see R.S. §1999, set out as a note under section 1481 of this title.

CROSS REFERENCES

Definition of the term–

National of the United States, see section 1101(a)(22) of this title.

Outlying possessions of the United States, see section 1101(a)(29) of this title.

United States, see section 1101(a)(38) of this title.

§1484. Loss of nationality by naturalized national.

(a) A person who has become a national by naturalization shall lose his nationality by–

(1) having a continuous residence for three years in the territory of a foreign state of which he was formerly a national or in which the place of his brith is situated, except as provided in section 1485 of this title, whether such residence commenced before after the effective date of this chapter;

(2) having a continuous residence for five years in any other foreign state or states, except as provided in sections 1485 and 1486 of this title, whether such residence

commenced before or after the effective date of this chapter.

(b) (1) For the purpose of paragraph (1) of subsection (a) of this section, the time during which the person had his residence abroad solely or principally for a reason or purpose within the scope of any provision of section 1485 of this title shall not be counted in computing quantum of residence.

(2) For the purpose of paragraph (2) of subsection (a) of this section, the time during which the person had his residence abroad solely or principally for a reason or purpose within the scope of any provision of sections 1485 and 1486 of this title shall not be counted in computing quantum of residence. (June 17, 1952, ch. 477, title III, ch. 3, §352, 66 Stat. 269.)

EFFECTIVE DATE

Chapter effective 180 days after June 27, 1952, see section 407 of act June 27, 1952, set out as a note under section 1101 of this title.

CROSS REFERENCES

Definition of the term–
Foreign state, see section 1101(a)(14) of this title.
National, see section 1101(a)(21) of this title.
Naturalization, see section 1101(a)(23) of this title.
Residence, see section 1101(a)(33) of this title.

§1485. Inapplicability of section 1484 to certain persons.

Section 1484(a) of this title shall have no application to a national who–

(1) has his residence abroad in the employment of the Government of the United States; or

(2) is receiving compensation from the Government of the United States and has his residence abroad on account of disability incurred in its service; or

(3) shall have had his residence in the United States for not less than twenty-five years subsequent to his naturalization and shall have attained the age of sixty years when the foreign residence is established; or

(4) had his residence abroad on October 14, 1940, and temporarily has his residence abroad, or who, thereafter has gone or goes abroad and temporarily has his residence abroad, solely or principally to represent a bona fide American educational, scientific, philanthropic, commercial, financial, or business organization, having its principal office or place of business in the United States, or a bona fide religious organization having an office and representative in the United States, or an international agency of an official character in which the United States participates, for which he receives a substantial compensation; or

(5) has his residence abroad and is prevented from returning to the United States exclusively (A) by his own ill health; or (B) by the ill health of his parent, spouse, or child who cannot be brought to the United States, whose condition requires his personal care and attendance; *Provided,* That in such case the person having his residence abroad shall, at least every six months, register at the appropriate Foreign Service office and submit evidence satisfactory to the Secretary of State that his case continues to meet the requirements of this subparagraph; or (C) by reason of the death of his parent, spouse, or child; *Provided,* That in the case of the death of such parent, spouse, or child the person having his residence abroad shall return to the United States within six months after the death of such relative; or

(6) has his residence abroad for the purpose of pursuing a full course of study of a specialized character or

attending full-time an institution of learning of a grade above that of a preparatory school: *Provided,* That such residence does not exceed five years; or

(7) is the spouse or child of, or has a son or daughter who is, an American citizen, and who has his residence abroad for the purpose of being with his American citizen spouse, parent, or son or daughter who has his residence abroad for one of the objects or considerations specified in paragraphs (1)–(5) or (6) of this section, or paragraph (2) of section 1486 of this title; or

(8) is the spouse or child of an American national by birth who while under the age of twenty-one years had his residence in the United States for a period or periods totaling ten years, and has his residence abroad for the purpose of being with said spouse or parent; or

(9) was born in the United States or one of its outlying possessions, who originally had American nationality and who, after having lost such nationality through marriage to an alien, reacquired it; or

(10) has, by Act of Congress or by treaty, United States nationality solely by reason of former nationality and birth or residence in an area outside the continental United States: *Provided,* That subsections (b) and (c) of section 404 of the Nationality Act of 1940, as amended, shall not be held to be or to have been applicable to persons defined in this paragraph.

(June 27, 1952, ch. 477, title III, ch. 3, §353, 66 Stat. 270; Aug. 4, 1959, Pub. L. 86-129, §1, 73 Stat. 274.)

REFERENCES IN TEXT

Section 404 of the Nationality Act of 1940, referred to in par. (10), was classified to former section 804 of this title, was repealed by section 403(a)(42) of act June 27, 1952, and it now covered by section 1484(a) of this title

AMENDMENTS

1959—Par. (7). Pub. L. 86-129 included a national who has a son or daughter who is an American citizen.

CROSS REFERENCES

Definition of the term—

Child, see section 1101(b)(1), (c)(1) of this title.
National, see section 1101(a)(21) of this title.
Naturalization, see section 1101(a)(23) of this title.
Organization, see section 1101(a)(28) of this title.
Parent, see section 1101(b)(2), (c)(2) of this title.
Residence, see section 1101(a)(33) of this title.
Spouse, see section 1101(a)(35) of this title.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1051

KARL ANTON POMEROY VON LEWINSKI, PETITIONER,

v.

BYRON V. PEPITONE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioner, a holder of dual citizenship in the United States and West Germany,[1] seeks to void an order to report for induction into the United States Army.

The material facts are undisputed. On March 6, 1963, petitioner registered with Selective Service Local Board No. 39 in Fairfax, Virginia. After the local board notified him in November 1968 that he was eligible for induction into the armed services, he asserted that he had relinquished his American citizenship and that, as an alien, he was ineligible for military duty. The local board rejected this assertion on January 14, 1969, and affirmed petitioner's "1-A" classification. On January 29, 1969, the local board ordered petitioner to report for induction. The local board subsequently notified petitioner that his in-

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[1]Petitioner was born in the United States on February 24, 1945. His mother was a native-born United States citizen and his father was a German alien. Petitioner therefore acquired at birth both American citizenship, under the Fourteenth Amendment, and German citizenship, under German municipal law.

duction was being postponed pending a further examination of his citizenship status. That examination was concluded in January 1971, and on February 2, 1971, the local board again ordered petitioner to report for induction.[2]

Petitioner did not report for induction as ordered, initiating instead the present action in the United States District Court for the District of Columbia seeking, among other things, to void the induction order.[3] Petitioner claimed in his complaint that (a) his taking of an oath of allegiance to the West German Republic in connection with the obtaining of a German passport and (b) his informing United States government officials of his intention to be a German national constituted voluntary acts which unequivocally indicated relinquishment of United States citizenship. The district court granted summary judgment for the government (Pet. App. 26a). The court of appeals affirmed (Pet. App. 30a-32a).[4]

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[2]Further details are set forth in the Appendix to the petition at pages 20a through 25a.

[3]Although the local board ordered petitioner on February 2, 1971, to report for induction "at the soonest possible time" (Pet. App. 24a), he did not initiate the present action until December 29, 1972.

[4]Petitioner asserted for the first time in his petition to this Court that his relinquishment of American citizenship was also effected under 8 U.S.C. 1481(a)(10), which deals with absenting oneself from or remaining outside of the United States "in time of war or during a period declared by the President to be a period of national emergency for the purpose of evading or avoiding training and service in the military, air, or naval forces of the United States." Since petitioner has not raised this issue earlier, he should not be permitted to advance it here. See *Lawn* v. *United States*, 355 U.S. 339, 362-363, n. 16. In any event, the continuing vitality of Section 1481(a)(10) is at best arguable under the present circumstances (see *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144) and the significance, so far as petitioner is concerned, of the fact that Section 1481(a)(10) is expressly limited to wartime and periods of national emergency is unclear. These issues would presumably be dealt with, however, should criminal proceedings against petitioner be initiated.

Petitioner contends that the ruling of the courts below is inconsistent with decisions of this Court as well as with the Ninth Circuit's decision in *King* v. *Rogers*, 463 F. 2d 1188. That contention is incorrect. The fundamental issue in all but one of the cases cited by petitioner was whether particular acts constituted relinquishment of American citizenship. None of those decisions controls the present case, however, since they did not deal with dual nationality problems such as those involved here or the means by which a dual national may voluntarily relinquish American citizenship.

In *Savorgnan* v. *United States*, 338 U.S. 491, naturalization in Italy of a native-born American accompanied by residence in Italy for approximately four years was deemed to constitute a relinquishment of American citizenship. The ruling in *King* v. *Rogers*, *supra*, was to the same effect. In *Perkins* v. *Elg*, 307 U.S. 325, on the other hand, this Court held that residence in a foreign state during minority of a child born of foreign parents in the United States did not, of itself, destroy American citizenship.[5]

In addressing petitioner's claim in the present case that he had effectively relinquished his American citizenship, the court of appeals stated (Pet. App. 32a):

> Neither of the acts which [petitioner] claims constitutes relinquishment of citizenship are necessarily any more than the assertion of his status as a dual national and the exercise of his rights as such. "The mere fact that [a dual national] asserts the rights of one citizenship does not without more mean that he renounces the other." [Citing *Kawakita* v. *United States*, 343 U.S. 717, 724.]

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[5]The fourth case cited by petitioner, *Rogers* v. *Bellei*, 401 U.S. 815, has no application here since the petitioner in that case was not a Fourteenth Amendment citizen, having instead acquired American citizenship by statute, and the sole issue in the case was whether Congress could condition that statutory grant by requiring a period of residency in the United States.

We submit that the court of appeals was correct in holding that this Court's decision in *Kawakita* v. *United States* is dispositive of petitioner's claim. There, as here, a person with dual citizenship exercised rights of nationality in two countries—including applying for and using a passport proclaiming citizenship in a country other than the United States. This Court held that those acts did not constitute effective relinquishment of petitioner's American citizenship.[6] As noted by the court of appeals in this case, 8 U.S.C. 1481(a)(6) provides a readily accessible means by which petitioner could have relinquished his American citizenship.[6] Instead of complying with the provisions of that section, and explicitly relinquishing his American citizenship, petitioner attempted for almost two years (see n. 3, *supra*) to have it both ways: that is he attempted to avoid one of the responsibilities of American citizenship (military service) while at the same time taking care not to foreclose in the future possibly claiming the benefits of that status.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

APRIL 1975.

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[6] 8 U.S.C. 1481(a)(6) provides that a person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by "making a formal renunciation of nationality before a diplomatic or consular officer of the United States in a foreign state, in such form as may be prescribed by the Secretary of State * * * ."